IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

GRANT WILSON, JR., Appellant, vs. FRANK HOLOHAN, Sheriff, Appellee. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	NO. 21684

APPELLANT'S OPENING BRIEF

Appeal from Order Denying
Petition for Writ of Habeas
Corpus

JOHN J. FLEET, and
EDWARD J. CRAGEN
555 Polk Street
San Francisco 94102
Telephone: 776-6990

Attorneys for Appellant

IN THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

GRANT WILSON, Jr., Appellant, -v- FRANK MADIGAN, Sheriff, Appellee. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	NO. 21684

APPELLANT'S OPENING BRIEF

Appeal from Order Denying Petition for Writ of Habeas Corpus

JOHN J. FAHEY, and
EDWARD L. CRAGEN
555 Polk Street
San Francisco 94102
Telephone: 776 8990
Attorneys for Appellant

TABLE OF CONTENTS

EDWARD L. CRABEN
ATTORNEY AT LAW
SAN FRANCISCO

TABLE OF AUTHORITIES CITED

Rules

United States Constitution

I

JURISDICTIONAL STATEMENT

A. Legal Grounds Disclosing Basis of Jurisdiction herein:

Jurisdiction of the United States District Court rested upon Title 28, U.S.C. Sections 2241 (a), 2241 (c)(3) and 2242; the Fifth, Sixth and Fourteenth Amendments to the United States Constitution; and, Fay v. Noia, (1963), 372 U.S. 391. 83 S. Ct. 822.

Jurisdiction of this Court is invoked under Title 28, U.S.C. Sections 1291, 2241 (a), 2241 (c)(3) & 2253. Title 28, U.S.C. Federal Rules of Civil Procedure, Rule 81 (a) (2); and, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

B. Opinions Below:

The opinion of the District Court of Appeal of the State of California, First District, Division One, handed down on November 30, 1965, and appears in the Official Reports at 238 CA 2d 447, 48 Cal. Rptr. 55. A copy of said opinion is attached hereto (Exhibit "A"). There was no written opinion by the Supreme Court of the State of California.

The opinion of the United States District Court for the Northern District of California was handed down on December 6, 1966. It is unpublished. A copy of said opinion is attached

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

hereto as Exhibit "B".

C. Statement of the Pleadings and Facts Conferring Jurisdiction:

Appellant was charged by an information filed by the District Attorney of Alameda County on November 12, 1963, with the crime of a felony, to wit, Burglary, a violation of California Penal Code Section 459. Said information was filed in the Superior Court of the State of California, in and for the County of Alameda, in an action entitled, "THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GRANT WILSON, Jr., Defendant", bearing no. 35373 in said Court.

After entering a plea of not guilty to the information, appellant was found guilty after trial by jury of the offense as charged on February 25, 1964. Thereafter, and on March 17, 1964, appellant was sentenced by the trial court as follows: Imprisonment in the State Prison for the term prescribed by law (i.e. 5 years to life), execution of said sentence suspended for the period of four years with a condition of probation that appellant serve one year in the Alameda County Jail.

Appellant served approximately two months of his aforesaid sentence in the Alameda County Jail and the trial court set bail on appeal, which said bail was posted. Upon posting the said bail, petitioner was released pending his appeal in the appellate courts of the State of California.

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

Timely notice of appeal was filed from said conviction on March 17, 1964. Appellant's conviction was sustained by Opinion of the District Court of Appeal. State of California First Appellate District, Division One, filed on November 30, 1965. Said Opinion is officially reported in 238 C.A.2d 447, 48 Cal. Rptr. 55. Thereafter and on January 10, 1966, a Petition for Hearing was filed with the Clerk of the Supreme Court of the State of California and on January 16, 1966, that Court entered its order denying said Petition.

On March 29, 1966, execution of the remainder of the aforesaid judgment was ordered, bail was exonerated and appellant was ordered into custody to serve the remainder of his one year sentence in the Alameda County Jail.

On or about March 23, 1966, an application for stay of execution of appellant's judgment pending application and hearing on writ of certiorari was delivered to the Clerk of the Supreme Court of the United States to be presented to Mr. Justice William O. Douglas, Associate Justice of the United States Supreme Court, and Circuit Justice for the Ninth Circuit. The matter was presented to Mr. Justice Douglas by the Clerk of the Supreme Court on March 29, 1966. Mr. Justice Douglas denied appellant's application for stay of execution pending the filing and disposition of a petition for a writ of certiorari in the United States Supreme Court.

On April 5, 1966. a petition for a writ of habeas

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

corpus was filed in the United States District Court for the Northern District of California (then Southern Division), being Action No. 44981 in said Court and entitled, "GRANT WILSON, Jr., Petitioner, vs. FRANK MADIGAN, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest." On the same day, an Application for Stay of Proceedings in State Courts and for Bail Pending Hearing and Determination on Petition for Writ of Habeas Corpus was filed in said action. An order to show cause on the said Petition and Application was issued April 6, 1966 and directed to the Attorney General of the State of California.

On April 14, 1966, a hearing was had on said order to show cause before the said United States District Court, the Honorable Alfonso J. Zirpoli, Judge Presiding. At said time and place the petition for writ of habeas corpus was submitted by the parties to the Court and the said Court issued its order setting bail in the amount of $1,000 on habeas corpus, ordered the appellant's release from state custody forthwith, and stayed the execution of judgment as against the State of California.

On June 28, 1966, the said District Court in said action, issued and filed its order vacating submission of the matter and directed the parties to file supplemental briefs in light of the decisions of Miranda vs. State of Arizona, No. 759, October Term, 1965 and Johnson vs. State of New Jersey

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

No. 762, October Term, 1965.

Thereafter the parties filed supplemental briefs, and on December 6, 1966, the said District Court issued and filed its order denying petitioner's petition for writ of habeas corpus, vacated its order releasing petitioner on bail and ordered appellant's return to the custody of respondent.

On December 16, 1966 appellant petitioned the said United States District Court for a certification of probable cause to appeal its aforesaid decision of December 6, 1966 to the United States Court of Appeal for the Ninth Circuit and for further relief to set aside and vacate the said Court's order setting aside and vacating stay of execution of sentence pending appeal.

Thereafter, and on December 15, 1966, pursuant to the provisions of 28 U.S. Code Section 2253 the said District Court issued its certificate of probable cause to appeal its order denying the petition for writ of habeas corpus (See Exhibit "C" attached hereto), said order being dated December 6, 1966, and on said date set aside and vacated its order setting aside and vacating the stay of execution of sentence pending appeal. Appellant was released from the custody of the respondent on bail in the sum of $1,000.00.

Thereafter, and on January 4, 1967, a timely notice of appeal was filed in the aforesaid action in the United States District Court for the Northern District of California.

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

II

STATEMENT OF THE CASE

Evidence adduced at the trial herein and comments by the prosecutor in his final argument:

After a telephone complaint to the Oakland Police, responding officers converged on the area of 271 Vernon Street in Oakland, California. Inspecting the premises, officers heard noises, and two men ran from the garage area of the building. They refused to obey one of the officers' commands to halt. While searching the neighborhood in the direction the suspects had gone, appellant emerged from between two buildings and started to run. One of the officers commanded, "Stop, or I will shoot" and appellant stopped. Officer Hoover drew his service revolver and held appellant at gunpoint. Immediately thereafter, Officer Fiege handcuffed the appellant. Appellant was breathing hard, sweating heavily and appeared frightened. (T.R. 187-188, 254-255*)

After Officer Hoover had drawn his revolver and was holding appellant at gunpoint, the officer was allowed to testify over objection that the following transpired (T.R. 194):

"Q. What did you say?

A. I asked him (appellant) what his name was.

Q. What did he say?

A. He didn't say anything.

* Hereinafter "T.R." will refer to the Trial Record.

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

"Q. Any other questions by you?

A. I asked him where he was going in such a hurry.

Q. What did he say, if anything?

A. He didn't say anything."

Immediately thereafter, Officer Fiege handcuffed appellant and ordered him into the back of the police car and they returned to 271 Vernon Street (T.R. 132). Over objection by trial counsel for appellant, Officer Fiege was allowed to testify that he had the following conversation with appellant in the police car at 271 Vernon Street (T.R. 133-138, 140-143):

"DISTRICT ATTORNEY: Q. All right what did you say to the defendant? What was the conversation, Officer?

A. I asked the defendant (appellant) his name. He did not answer. I asked him his address, he did not answer. I asked him if he lived in that area. He did not answer. I asked him who he had been with. He did not answer. I asked him if there was anybody in that area that I could contact to clear him, and he still did not answer."

Shortly thereafter, Officer Hoover came to the patrol car in which appellant was sitting, handcuffed, and stated (T.R. 142-143):

"There had been a burglary committed at 271 Vernon Street."

Then Officer Fiege testified:

"I told the defendant (appellant) that there was a burglary in that building and that he was under arrest for investigation of burglary and I asked him if he had anything to say for himself. I repeated this twice. On the third

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

"time, he said, his answer was, 'was there a burglary committed in that building?'" (T.R. 143)

Officer Fiege testified further as to all the remainder of any conversation between him and appellant. (T.R. 143):

"The only thing I did say was that we would have to book him without a name because he would not give us his name or address or anything else."

At no time was appellant advised of his Fifth Amendment privilege against self-incrimination. At no time was appellant advised of his Sixth Amendment rights to counsel and to remain silent.

Among the following are some of the comments made by the prosecutor in his final argument:

"(Hoover commanded appellant) 'Stop, or I will shoot', and the man stopped. So (Hoover) walks up and says (to appellant), 'What is your name?' This is an innocent man, mind you, and he didn't know anything about the law; just a grand guy out there in the street. "What is your name - where are you going in such a hurry, buddy?' Not a response. (T.R. 398). He won't even say his name; won't even give his name." (Emphasis added.)

"(After appellant was handcuffed, the officers asked him), "What is your name?' Nothing. 'What is your address?' Nothing. 'Who are you visiting; why were you here?' Nothing. Then Mr. Hoover, Officer Hoover comes out and says, 'We find a door has been opened.' This is the door to Agent Wilkins' apartment. 'We find a door has been opened.' So right then, now, we have got something. Hoover told that in front of this man and the officer said, 'You are accused of burglary of that apartment and that building.' to which he said nothing. * * * you

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

"have got him (appellant) in the face of an accusatory statement not saying anything." (T.R. 401) (Emphasis added.)

"* * * But the critical thing is he (appellant) is willing to talk now when he wasn't that night (of the arrest) * * *" (T.R. 402) (Emphasis added.)

"* * * That man knew in advance what to do - for example, not to talk to police officers." (T.R. 424)

"Unexplained possession of stolen property means at the time when he was caught. This when it is important, and not now. This is when you know; that's when a man has to think on his feet. And this man had it licked. He said nothing. This is the best, frankly. If any of you would be a burglar, that is the thing to do, say nothing. That's just what he did." (T.R. 423) (Emphasis added.)

Other and similar comments by the prosecutor in his final argument can be found at pages 389, 390, 404, 407 and 428 of the Trial Record.

III

SUMMARY OF OPINIONS BELOW

A. Holding of California:

The District Court of Appeal, State of California, First Appellate District, Division One held in its opinion (Op., Exhibit "A").

1. Evidence of questions propounded to appellant by interrogating officers and his ensuing conduct was properly admitted in that his silence in the vace of questioning was "mere non-assertive conduct; * * * not a declaration but a failure to

offer an explanation, under circumstances which call for one, which in turn gives rise to an inference and consciousness of guilt," (Op. 9), and his failure to deny an accusation when advised that he was under arrest for investigation of burglary added the element of an "adoptive admission that the charge was true." (Op. 10).

2. California Penal Code Section 647(e) makes it a criminal offense for a person to loiter or wander upon the street from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to so do. It then concludes that if there is such a right to interrogate, the "results of such interrogation should be available * * * (herein). (Op. 12)

3. The Dorado (62 C.2d 350) proscription was not applicable herein in that the burglary for which appellant was arrested was discovred during appellant's interrogation; and, that the interrogation of appellant while he was under gunpoint, handcuffed and in the police car did not fall within Dorado in that "they (the police) were affording him an opportunity which police officers normally and routinely offer to any person whom they are taking into custody to give any explanation of his conduct which he may desire to give." (Op. 13-16)

4. Griffin v. California, 380 U.S. 609, does not require a reappraisal of the rule which permits evidence of

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

conduct, more particularly of silence, of the defendant to be admitted as evidence of consciousness of guilt. (Op. 15-16)

B. Holding of the United States District Court:

The United States District Court for the Northern District of California, the Honorable Alfonso J. Zirpoli, Judge presiding, held in its opinion (U.S. Op.*):

1. Appellant's federally protected constitutional rights were not denied him "* * * when the prosecution introduced evidence of his silence in response to accusatory questions as an admission by silence * * *" in that appellant's trial commenced February 20, 1964. (U.S. Op., page 2) In making this holding the Court stated that it is now clear that silence of an individual under police custodial interrogation cannot be used against him in a criminal trial, citing Miranda v. Arizona, 385 U.S. 719 (1966), and held that appellant was not entitled to the benefit of the statement of law in Footnote 37 in Miranda. (U. S. Op., pages 3, 4 and 5). In this regard it held further that the rule of "prospective application" for the holding in Griffin v. California, 380 U.S. 609 (1965), as set forth in Tehan v. Shott, 382 U.S. 406 (1966), is not applicable to appellant and that Footnote 37 "* * * is considered a part of the holding in Miranda * * *" and that the reference therein "* * * to Griffin v. California, supra, is merely by way of analogy

---

* "U.S. Op." hereinafter will refer to Judge Zirpoli's opinion, Exhibit "B".

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

* * *". (U.S. Op., pages 4 and 5).

2. It made no finding and expressed no view as to whether appellant was in custody at the time the interrogation was conducted. (U.S. Op., page 3)

3. It cited People v. Simmons, 28 Cal.2d 699 (194 and applying the test set forth therein stated:

> "* * * It seems clear that the State itself conceded that petitioner (appellant) was invoking his privilege against self-incrimination. The record is replete with comment by the prosecutor on the silence of the defendant. Two of the more startling examples of comment by the prosecutor are:
>
> 'What is your name? This is an innocent man, mind you, and he didn't know anything about the law; just a grand guy out there in the street.'" (T.R. 398) (Emphasis added.)
>
> "'* * * That man knew in advance what to do - for example, not to talk to police officers.'" (T.R. 23) (Emphasis added) (U.S. Op., page 5)

Then the United States District Court made this startling observation:

> "It is surprising to this Court that the state courts found that the above comments did not violate the rule laid down in the Simmons case; but the question is one of state law, not federal law, since petitioner cannot come within the date for prospective application of Miranda." (U.S. Op., page 6)

IV

SPECIFICATION OF ERROR

THE UNITED STATES DISTRICT COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO THE BENEFIT OF

THE RULE OF PROSPECTIVE APPLICATION OF GRIFFIN VS. CALIFORNIA ACCORDING TO TEHAN VS. SHOTT. IT FURTHER ERRED IN HOLDING THAT JOHNSON VS. NEW JERSEY CONTROLS HEREIN RE PROSPECTIVE APPLICATION OF MIRANDA VS. ARIZONA.

V

ARGUMENT

The rules of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), and Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772 (1966), have application to the case at bench only insofar as Miranda aids in the interpretation of Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229 (1965). Appellant falls within the holding of Griffin and is entitled to habeas corpus thereunder by its proper prospective application as delineated by Tehan v. United States Ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459 (1966).

Inherent in the decision of the United States District Court (Exhibit "B") is the underlying feeling that appellant has not been treated fairly by the Courts of the State of California and that the District Court's order was commanded by the holding in Miranda v. Arizona, supra, and Johnson v. New Jersey, supra. The United States District Court recognized that appellant's liberty depends upon the interpretation it placed upon the language in Footnote 37 in the majority opinion of Miranda v. Arizona, 384 U.S. 468, 86 S.Ct. 1624. It does

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

not appear that the language in said footnote has been interpreted by any federal court other than by the opinion of Judge Zirpoli herein below. (See copy of Petition for Certificate of Probable Cause filed in the United States District Court and part of the record on appeal herein.)

If, as the United States District Court contends, this case is controlled solely by the holding in Miranda, and not by Miranda in clarifying and restating Griffin, appellant has no standing before this Court due to the rule of prospective application as set forth in Johnson v. Maryland, supra.

On the other hand, if Footnote 37 merely clarifies and restated the holding in Griffin, the United States District Court erred and should have applied the prospective application rule of Tehan, supra, and should have issued a writ of habeas corpus to appellant.

The pertinent part of the aforesaid Footnote 37 states:

> "In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf Griffin vs. California, 380 U.S. 609, 85 S.Ct. 1229 ***"

According to Webster's New Collegiate Dictionary, Abbreviations Used In This Work, "Cf" is the abbreviation for "confer (L. compare)". "Confer"is defined as "To compare; now only in the imperative."

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

The Court in Miranda does not contrast or differentiate Griffin, but, rather, it compares. Thus it represents as similar and likens the footnote to its holding in Griffin.

Griffin compels the issuance of a writ of habeas corpus herein.

In Miranda, certain new guidelines are set forth for constitutional law enforcement (e.g., the necessity of providing an attorney at no expense to a suspect)

The Court also makes certain many points which were somewhat ambiguous in prior opinions. It defined what it meant in Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, when it spoke of an investigation which had focused on an accused. It set forth in particularity the three required admonitions which must be made to a suspect from its opinion in Escobedo, (1) to warn him of his right to remain silent, (2) to inform him of his right to consult with an attorney prior to making a statement, and (3) to inform him that anything he says will be used against him in a Court of Law. It further stated that the right to an attorney could not depend upon a request (as California defined Escobedo in People vs. Dorado, 62 Cal.2d 338).

In Footnote 37 of Miranda, the Court followed the latter concept and merely defined and made certain that which could be considered as ambiguous in Griffin. The Court did not make new law in Footnote 37.

Thus, when Johnson v. New Jersey, supra, is applied

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

to the present case, the rule as to prospective application as set forth in Tehan vs. United States Ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, applies.

The basic concept of the Court in Escobedo that there is a right to counsel before arraignment as well as after arraignment is woven through the reasoning of Griffin. In the case at bench, the proscribed comments of the Court or prosecutor are the same for acts of the defendant within the courtroom as well as acts of the defendant prior to trial.

The rule of prospective application herein is set forth in Tehan v. United States Ex rel. Shott, supra, (to wit Griffin) does not apply to cases where (a) judgment of conviction is final and (b) the availability of appeal in the State Courts has been exhausted, and (c) time to file a petition for certiorari has passed (or certiorari denied), all prior to April 29, 1965 (the effective date of Griffin).

Herein, the State Courts had not finally decided the matter prior to the United States Supreme Court's holding in Griffin.

VI

CONCLUSION

WHEREFORE, appellant respectfully submits that the Order of the United States District Court denying his Petition for Writ of Habeas Corpus should be reversed for the reasons stated heretofore, and for such other and further relief as this

EDWARD I. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

Court deems meet and proper in the premises.

DATED: August 7, 1967.

EDWARD L. CRAGEN and
JOHN J. FAHEY

By _____
EDWARD L. CRAGEN
Attorneys for Appellant

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

NT WILSON, JR.,

Defendant and Appellant.

Following a jury verdict finding defendant guilty of glary in the first degree in violation of section 459 of the nal Code, he was sentenced to be imprisoned in the state prison r the term prescribed by law. Execution of sentence was sus- nded and he was placed on probation for a period of four years on terms and conditions which included serving a term of one ar in the county jail. Defendant has appealed from the final dgment of conviction, from the sentence imposed, and from an der denying a motion for a new trial. Although the propriety the order denying a motion for a new trial may be reviewed on he appeal from the judgment, no appeal lies from it as such, so he purported appeal from that order must be dismissed. (Pen. ode §1237.) The appeal from the sentence is merged in that from he judgment. (Id., and see People v. Sweeney (1960) 55 Cal. 2d 7, 33.)

Defendant contends that the trial court erred in admitting testimony of "conversations" had with the defendant. Because there is only one statement of the defendant involved, the question is

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION ONE

E PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANT WILSON, JR.,

Defendant and Appellant.

1 Crim.

Following a jury verdict finding defendant guilty of urglary in the first degree in violation of section 459 of the enal Code, he was sentenced to be imprisoned in the state prison or the term prescribed by law. Execution of sentence was suspended and he was placed on probation for a period of four years pon terms and conditions which included serving a term of one ear in the county jail. Defendant has appealed from the final udgment of conviction, from the sentence imposed, and from an rder denying a motion for a new trial. Although the propriety f the order denying a motion for a new trial may be reviewed on the appeal from the judgment, no appeal lies from it as such, so the purported appeal from that order must be dismissed. (Pen. Code §1237.) The appeal from the sentence is merged in that from the judgment. (Id., and see People v. Sweeney (1960) 55 Cal. 2d 27, 33.)

Defendant contends that the trial court erred in admitting testimony of "conversations" had with the defendant. Because there is only one statement of the defendant involved, the question is

more properly framed as whether or not the trial court was justified in admitting evidence of questions propounded to the defendant, together with evidence of the lone answer to one and his failure to answer the remaining questions, on the grounds that such evidence either showed acquiescence of the defendant in the truth of the statement, or indicated his consciousness of guilt. For reasons hereinafter set forth the rulings of the trial court are upheld.

The defendant contends that it was error to admit in evidence certain articles found on his person which were not shown to have been actually connected with the burglary which in fact occur that it was error for the prosecutor to maintain these articles in view of the jury prior to their introduction in evidence; and that the prosecutor committed prejudicial error in referring in his argument to an article which was not admitted in evidence. A review herein of the circumstances of this case reflects that all of the articles were properly before the jury and no error can be predicated on any of the foregoing propositions.

Defendant does not contend that the evidence is insufficie to sustain his conviction. It is, however, necessary to recount it in substance so that the matters complained of can be viewed in prope perspective. This is particularly true insofar as it is contended that certain police action violated defendant's prearraignment right to be advised of his rights to counsel and to remain silent. (See People v. Stewart (1965) 62 Cal. 2d 571, 579.)

The victim, a United States Treasury Agent, testified that he lived in apartment 002 of a three-story apartment building with approximately 20 units at 271 Vernon Street in Oakland; that his apar ment was the rear one of two on a floor below the level of Vernon

treet, but above the carport area in the back of the apartment.

On Friday, September 13, 1963, at about 7:00 p.m., he left he apartment for the weekend, turned off the lights, and locked the oor. Keys to the apartment were held by himself, the manager and is wife, who was away during all of the period involved. Although he bed was not made up, generally everything was in order in the partment.

Early the following morning, at 3:30 a.m. on September 4th, pursuant to directions received on the police radio, three fficers converged on the premises at 271 Vernon Street. Officer usk, the first to arrive, talked to a man coming out of the drive- ay of the premises and went down the driveway into a garage area nder the apartment building. He continued on through a door to the ack of the building to another parking area under the apartment and hecked the automobiles there. Officer Hoover, who pulled up as Lusk as getting out of his car, walked over and talked to the reporting arty in the driveway with Lusk. While he was still there Officer iege arrived and joined the conversation. Hoover went down to heck cars in the subterranean garage.

Fiege went searching down through the garage and out the ame door through which Lusk had exited toward the rear of the uilding. He descended some stairs which led to a back driveway lead- ng to the carports under the apartment. Just before he entered the riveway he heard a commotion of feet moving in the driveway and round the side of the building. He stepped around the corner, showed is flashlight in the direction from which he had heard the noise, nd saw the lower half of a man going in the doorway in the middle of he building. He shouted, "Come out of there," went to the doorway

and observed two men going through a doorway at the top of some stairs at the end of a hall. He got to the top of the stairs in time to see the two men running down another hallway. He observed that they both had on dark clothes and that the rearmost of the two men had black gloves on and some kind of black cloth in his left rear pocket. The man in front seemed to have a suit coat on, and the other a knit-type sweater. Fiege was running and shouting "Halt," but the men did not halt. They ran out of the building, turned right on Vernon Street and turned off Vernon Street into a driveway.

Meanwhile Lusk, who was also in the rear of the building, had heard Fiege's shouts. He turned and saw Fiege starting up the stairway. He ran over and saw Fiege at the first landing with someone running ahead of him. Lusk doubled back around the side of the building, and by the time he came to the street there was no one there.

Hoover, who was just about to go through the door from the subterranean garage to the rear, heard the shouts and sounds of running to the rear of the building. He ran toward the street and as he came up the stairway saw "people" running south on Vernon with Officer Fiege running after them. He chased them down Vernon Street and saw one turn in the driveway.

Fiege, who was tired, gave up the chase at the point where Hoover overtook him, and returned to his patrol car. Hoover ran into the driveway and stopped momentarily in a parking area. He heard sounds to the south and to the west, and followed those which he believed to be the closer. Upon arriving at a stairway he saw a person descending and yelled, "Stop, police." The suspect turned north on reaching the street at the foot of the stairs, and Hoover, on arriving at the same street, observed him run northbound and turn

to the left between two buildings. At this point Fiege drove by, conversed with Hoover and continued around the block. Hoover again saw the suspect as the latter emerged from between the two buildings and started to run across a traffic island. When the officer again yelled, "Stop, or I will shoot," he stopped. Hoover held him, now identified as the defendant, at gun point. He was joined by Officer Dorsey who handcuffed the defendant and in less than a minute Fiege came on the scene.

Both Fiege and Hoover noticed that the defendant was out of breath and sweating profusely, and according to Hoover, he appeared to be frightened. He was attired in a white shirt with a dark sweater which was tucked in at the collar, dark pants, dark shoes and no socks. He had black leather gloves on, and held a silver pen-light in his hand.

At the trial Hoover was asked to relate any conversation he had with the defendant at this point. After objection was overruled the following transpired: "Q. ... What did you say? A. I asked him what his name was. Q. What did he say? A. He didn't say anything. Q. Any other questions by you? A. I asked him where he was going in such a hurry. Q. What did he say, if anything? A. He didn't say anything."

Hoover then searched the defendant and found the following: three pairs of socks - gray, black and brown argyle - and a black silk sack in his left rear pants pocket; a second small pen-light in the sack; a black Navy watch cap in the right front pants pocket; a pair of bolt cutters with the handles cut off in his right rear pants pocket; and three plastic strips in his only shirt pocket. Defendant bore no wallet, credit cards or other cards indicating his identificat

He had nothing else on his person other than a normal man's white handkerchief and money amounting to seven or eight dollars.

Fiege placed the defendant in his patrol car and returned to park in front of 271 Vernon Street. Hoover retraced his steps in a vain search for anything that might possibly have been thrown away. Meanwhile Lusk had been looking around the apartment building and found the door of apartment 002 open two or three inches. The apartment was dark and no one responded when he rang the bell. He went out to the front to get another officer to enter the apartment with him.

Lusk met Hoover, who had returned to the apartment building, and they returned and entered apartment 002. They observed three jewelry boxes and the scattered contents thereof on the bed, and drawers of a dresser standing open.

At the trial Fiege was interrogated as to what transpired in the police car and, after defendant's objection was overruled, testified as follows: "Q. All right, what did you say to the defendant; what was the conversation, Officer? A. I asked the defendant his name. He did not answer. I asked him his address. He did not answer. I asked him if he lived in that area. He did not answer. I asked him who he had been with. He did not answer. I asked him if there was anybody in the area that I could contact to clear him, and he still did not answer."

The witness continued: "This took a few minutes. I was interrogating him and Officer Hoover came to the side of the car and said, 'There was a burglary committed in that building.'"

These remarks were stricken pending presentation of further foundation and argument which ended in the overruling of defendant's

objection, and the examination continued as follows: "Q. What did Officer Hoover say? A. Officer Hoover told me that there had been a burglary committed in 271 Vernon Street. Q. Did you have further conversation with the defendant at that time? A. I did. Q. What did you say and what did he say? A. I told the defendant that there was a burglary in that building and he was under arrest for investigation of burglary, and I asked him if he had anything to say for himself. I repeated this twice. On the third time he said, his answer was, 'Was there a burglary committed in that building?'"

According to the officer the only other remark which was passed to or from the defendant was, in the witness' words: "The only thing I did say was that we would have to book him without a name because he wouldn't give us his name or address or anything else."

Lusk returned to the apartment with the manager, locked it up and left a note for the tenant. The victim returned to the apartment about 1:00 p.m. on Sunday, September 15th. He found the jewelry boxes lying dumped over with their contents spread out over the bed, and discovered that a gun and handcuffs had been taken from the top drawer of a chest of drawers. Subsequently, after examining the articles held by the police, he discovered that the pair of black stretch socks and the pair of brown argyle socks with a small hole were missing from the third drawer of the same chest. Nothing else was missing from the apartment.

An experienced burglary investigator testified that he was familiar with tools used by burglars in practicing their trade or profession; that the bolt cutters, the handles of which had been shortened, and the isinglass or plastic strips are burglary tools;

hat he had opened both a door to the apartment building and the door
o apartment 002 by use of one of the strips; that a plastic strip
hen so used usually does not leave a mark; and that the bolt cutters
f used to cut a night chain, or as a prying instrument, would leave
mark. There were no night chains on any of the apartment doors
n question, and the record is devoid of any evidence to show that
ny marks were found.

The defendant testified that he and his wife had arrived
n Oakland about midnight September 13, 1963 on the return trip to
is home in Los Angeles from a visit to his ailing father in Camas,
ashington; that with his brother and the latter's wife, who came in
nother car, they took separate rooms at the Fairview Motel, about
ix or eight blocks away from where he was apprehended; that being
nable to sleep, he went for a walk, found the black bag, and was
xamining its contents - trying the gloves for fit, and putting
hings in his pockets as he pulled them out - when he heard a com-
otion; that he looked up and saw two men running, and he started to
un; and that when they identified themselves as officers, he stopped
nd was taken into custody. He denied he had ever been in apartment
02 at 271 Vernon Street, and stated that the three pairs of socks
ound in his pocket came from the black bag he had picked up.

He denied that Officer Hoover was present at the scene
f his original apprehension, and that any officer questioned him
t that point. He stated that when questioned in front of the premises
e told the officers he was not a burglar and denied vehemently that
e had anything to do with a burglary. He admitted that he failed to
nswer questions concerning his name and address, and that he had not
iven the officers the account of his activities he recited from the

itness stand.

His wife verified his activities to and including their egistering at the motel in Oakland, and two former fellow employees ouched for his character.

I. Evidence of the questions propounded to defendant and his ensuing conduct was properly admitted.

Defendant assumes that all of the questions propounded o defendant by both officers are accusatory statements, and that it as error to admit them and his conduct in response thereto because f his right to remain silent under the federal and state Constiutions. He appeals to three separate, although related, legal rinciples, as demonstrating the error of the trial court (see People . Simmons (1946) 28 Cal. 2d 699, 721; People v. Dorado (1965) 62 al. 2d 338, 342-357; and Griffin v. California (1965) 380 U.S. 609), ut no one of them is controlling here.

Before examining his arguments it is proper to analyze he nature of the evidence of which complaint is made. The questions irected to defendant concerning his name, where he was going in such hurry, his address, whether he lived in the area, with whom he had been, and whether there was anyone in the area the officer could contact to clear him, contain no accusations which are converted into adoptive admissions by the defendant's silence, unless resort be had to the fact, which was conceded by all, that he was in a hurry when apprehended. The silence here is mere nonassertive conduct; it is not a declaration but a failure to offer an explanation, under circumstances which call for one, which in turn gives rise to an inference of consciousness of guilt. (See Cal. Evidence Code (1965) §§ 225, subd. (b) and 1200, and Comment, §1200; cf. 2 Wigmore, Evidence,

§§273, 276, pp. 106-111; and Witkin, Cal. Evidence, §214, p. 239; with 4 Wigmore, Evidence, §§1071-1072, p. 70, et seq.; and Witkin, Cal. Evidence, §§235-237, pp. 266, et seq.)

On the other hand the failure to deny the accusation, when Fiege advised the defendant that he was under arrest for investigation of burglary, and asked him if he had anything to say for himself, could give rise not only to an inference of consciousness of guilt, but also an adoptive admission that the charge was true. (See Code Civ. Proc., §1870, subd. (3); Cal. Evidence Code (1965) §1221; and texts last cited.)

(A) In People v. Simmons, supra, 28 Cal. 2d 699, at page 721, the opinion points out it is an abuse of discretion on the part of the trial court to admit statements of the defendant's woman friend and a codefendant which tended to incriminate defendant where it was obvious from his responses, on being confronted with these statements - "I told you all I am going to tell you," etc. - that he was attempting to exercise his constitutional privilege against self-incrimination. (See also Martinez v. Superior Court (1964) 224 Cal. App. 2d 755, 757-759.)

The opinion lays down the general rules as to the use of accusatory statements as follows: "Accusatory statements of the character here involved are plain hearsay. They may properly find their way into the record only as admissions, under the familiar exception to the hearsay rule. If the accused responds to the statement with a flat denial, there is no admission and hence nothing that may be received in evidence. If, on the contrary, the truth of the statement is admitted, the statement may properly be introduced. A third situation is presented when the accused stands mute in the face

f the accusation or responds with an evasive or equivocal reply. In hat situation this court has held that under certain circumstances oth the statement and the fact of the accused's failure to deny are dmissible on a criminal trial as evidence of the acquiescence of the ccused in the truth of the statement or as indicative of a consciousess of guilt.

"The theory underlying this rule is that the natural rection of an innocent man to an untrue accusation is to enter a rompt denial. Where his response is silence, evasion, or equivoation, it is for the trial court to determine in the first instance hether the accusation has been made under circumstances calling for reply, whether the accused understood the statement, and whether his onduct or response was such as to give rise to an inference of acuiescence or guilty consciousness. Where the trial judge deterines that such an inference may be drawn, the statement is then dmitted, not as substantive evidence in proof of the fact asserted ut merely as a basis for showing the reaction of the accused to it." 28 Cal. 2d pp. 712-713; see also People v. Whitehorn (1963) 60 Cal. d 256, 261-262; People v. Davis (1957) 48 Cal. 2d 241, 249-250; eople v. Davis (1954) 43 Cal. 2d 661, 669-672; People v. De Leon (1965) 236 A.C.A. 582, 587; People v. Stewart (1965) 236 A.C.A. 27, 3; People v. Atwood (1963) 223 Cal. App. 2d 316, 329-331; People v. Flynn (1963) 217 Cal. App. 2d 289, 295-296.)

Here the court properly passed on the admissibility of the evidence and the jury was correctly instructed, substantially as suggested in Whitehorn (60 Cal. 2d at p. 261, fn. 1), and in Atwood (223 Cal. App. 2d at p. 328, fn. 5). No violation of Simmons appears on the record. Defendant suggests that the defendant's silence is of

tself an indication of his claim to the constitutional privilege gainst self-incrimination, and that therefore no accusatory state-ent or other question can be used. This argument was made and re-ected in Flynn (217 Cal. App. 2d at p. 296; and see Atwood, 223 Cal. pp. 2d at p. 331).

Furthermore, as pointed out above the only implied ad-ission used against him was that arising from his failure to deny he accusation after the burglary was discovered. It is recognized hat, "There is, of course, nothing unreasonable in an officer's uestioning persons outdoors at night [citations], and it is possible hat in some circumstances even a refusal to answer would, in the ight of other evidence, justify an arrest. [Citation.]" (People . Simon (1955) 45 Cal. 2d 645, 650.) The cases setting forth the alifornia rule permitting temporary detention for questioning are et forth in People v. Machel (1965) 234 A.C.A. 38, 44-45. In fact ince 1961 it has been provided by statute: "Every person who commits ny of the following acts shall be guilty of disorderly conduct, a isdemeanor; ... (e) Who loiters or wanders upon the streets or from lace to place without apparent reason or business and who refuses to dentify himself and to account for his presence when requested by ny peace officer so to do, if the surrounding circumstances are such s to indicate to a reasonable man that the public safety demands uch identification." (Pen. Code, §647, subd. (e); and see People v. rumo (1962) 211 Cal. App. 2d Supp. 855, passim.) If there is such right to interrogate, the results of such interrogation should be vailable where they reflect conduct on the part of the defendant hich tends to establish his guilt unless there is a supervening olicy of the law which prevents the use of the conduct or statements

of the accused.

(B) Defendant contends that the principle established in People v. Dorado, supra, 62 Cal. 2d 338, 342-357, which precludes the use of a defendant's statements against him under the circumstances therein outlined, now prohibits the use of a defendant's silence under similar circumstances. This, of course, may well be true in regard to any adoptive admission or attempt to use the defendant's silence or evasive conduct to show that the declarations of another are true. (See People v. De Leon, supra, 236 A.C.A. 582, 588-590; People v. Stewart, supra, 236 A.C.A. 27, 30-34.) The juxtaposition of Simmons and Dorado was envisioned by Justice Carter in the former case when he suggested that the defendant when being interrogated in the accusatory stage should be cautioned that his reaction to an accusatory statement would be used against him. (28 Cal. 2d pp. 718-719.) Stewart points out that it is inconsistent to state on the one hand that the defendant should be advised of his constitutional right to remain silent, and yet at the same time permit that silence to be used against him as evidence of his guilt. (236 A.C.A. at p. 33.)

The facts here, however, do not come within the prescription of Dorado. The defendant was in custody, either under arrest, or perhaps, until the burglary was discovered, merely being detained for investigation. The investigation had focused on him, although at the outset it may not have been clear just what, if any, offense had been committed. He was not effectively informed of his right to counsel and of his right to remain silent. He had not waived those rights, and in fact did remain silent for reasons which were unexpressed and best known to himself.

Two circumstances distinguish this case from Dorado and

from Stewart and De Leon. Because the questions propounded to defendant before the discovery of the burglary were not accusatory statements, there is no attempt to foist the declarations of others on the defendant as his own admissions. The defendant's failure to respond to inquiries concerning his name, address, destination, companions, if any, and acquaintanceship in the neighborhood is, as pointed out above, in no sense the adoption of declarations of another No declarations or statements of the defendant are involved, and his silence cannot be distinguished in this regard from his other non-assertive conduct in fleeing from the scene and twice previously refusing to obey the officers' commands to halt.

Circumstances may be imagined where answering the type of question here involved would violate the provision against self-incrimination which has been extended to nontestimonial compulsion. (See People v. Dorado, supra, 62 Cal. 2d at p. 352, applying Escobedo v. Illinois (1964) 378 U.S. 478 ; and People v. Stewart, supra, 236 A.C.A. 27, 30.) Dorado, however, recognizes: "Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions." (62 Cal. 2d at p. 354.) So here appears a second distinction between the facts of this case and those of Dorado, Stewart and De Leon. The circumstances here reflect that at the time the preliminary questions were asked the officers did not know what crime, if any, had been committed. The questions were not designed to elicit incriminating statements, but to afford the defendan an opportunity to explain his presence and actions. Therefore, even if the probative facts elicited be deemed extrajudicial statements, as

distinguished from nonassertive conduct, they are admissible as admissions obtained before the authorities had commenced a process of interrogation that lent itself to eliciting incriminating statements. In People v. Cotter (1965) 63 A.C. 404, 411, the opinion recites: "The more crucial conversation (the fourth) with the officers in the police car, was admissible for the further reason of absence of one of the conditions deemed essential to render the statement inadmissible under the rules laid down in Escobedo, Dorado and Stewart. Clearly, the statement made in the police car was not the product of a process of interrogation aimed at eliciting incriminating statements from defendant. The police merely asked him what had happened at the Buus residence. They were affording him an opportunity which police officers normally and routinely offer to any person whom they are taking into custody to give any explanation of his conduct which he may desire to give. It is a routine means of commencing an investigation."

If the defendant's express admissions at this stage of the investigation may be admitted, he should also be held accountable for such "admissions" as properly may be inferred from his conduct. The foregoing principle not only covers the evidence of the original interrogation by both officers to which defendant failed to respond, but also the original question after the burglary was discovered when he was asked if he had anything to say for himself and ultimately allegedly responded, "'Was there a burglary committed in that building

(C) Finally defendant contends that Griffin v. California, supra, 380 U.S. 609, requires a reappraisal of the rule which permits evidence of conduct, more particularly silence, of the defendant to be admitted as evidence of consciousness of guilt. (See People v.

Stewart, supra, 236 A.C.A. 27, 30-31.) Griffin holds that the Fifth Amendment privilege against self-incrimination is violated by a rule which permits comment on the defendant's failure to take the stand and testify in his defense. The rule on its face does not apply to commentary on defendant's conduct prior to the trial. It is already established by Simmons that no inferences may be drawn from an accused failure to offer an explanation where he rests it on the privilege to remain silent. Dorado, as noted above, extends the prohibition to the situation where the elements of that case are present either because the defendant was warned of his right to remain silent and so rests on that privilege, or because he should have been warned of that right and the failure to warn taints all that is elicited from the accused thereafter. Nothing in Griffin requires the rejection of the inference to be drawn from the accused's nonassertive conduct, or from his silence prior to the accusatory stage when it is not rested on constitutional grounds. The considerations of reasonable investigation, sanctioned by Dorado, should control.

II. The items found in defendant's possession were admissible in evidence.

Defendant contends that of the items found in his possessio only the socks should have been admitted in evidence. This objection goes to the black silk sack, black gloves, the pen-lights - one in his hand and one in the sack - the watch cap, the bolt cutters and the three plastic strips. The court excluded the bolt cutters, and defendant's argument is confined to the plastic strips, so the remaining articles do not require individual attention. Although the bolt cutters themselves were not admitted into evidence, the testimony that they were found on the defendant's person was never stricken. The propriety of the action of the prosecution in establishing and subse-

quently referring to defendant's possession of this tool is involved.

"As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation." (People v. Bannon (1922) 59 Cal. App. 50, 56; and see Code Civ. Proc. §1954; People v. Trujillo (1948) 32 Cal. 2d 105, 115; People v. Green (1939) 13 Cal. 2d 37, 43; and People v. Lindsay (1964) 227 Cal. App. 2d 482, 497-501.)

An early decision of the Supreme Court upheld the admission and exhibition as evidence of burglarious tools which were found in the defendant's carpet bag at the time of his arrest, because the record failed to show that they did not tend to connect the defendant with the burglary in question. The court stated:

"Burglarious tools found in the possession of the defendant soon after the commission of the offense may be offered in evidence whenever they constitute a link in the chain of circumstances which tend to connect the defendant with the commission of the particular burglary charged in the indictment. But before they can be received it must be shown that the burglary charged was in fact committed. When this has been done nothing remains but to ascertain who was the guilty party; or in other words to connect the defendant with the burglary thus established. It rarely happens that this can be done by the direct evidence of witnesses who saw and recognized the defendant in the act; hence in a majority of cases a resort must be had to circumstantial evidence, and any circumstances of which it can be reasonably affirmed that they form links in a chain which tends to connect the defendant with the commission of the burglary are competent evidence against him; but circumstances of which this cannot be affirm

are not. Hence the possession of burglarious tools at or about the time the burglary was committed may or may not be a material fact and competent for the prosecution to prove, and whether it is or not depends necessarily upon the other circumstances of the case. In order to render it material there must be a possible and probable connection between it and the other circumstances given in evidence. If it appears from the other evidence in the case that the defendant was in the vicinity at or about the time the burglary was committed and that it was committed by the aid of burglarious tools, the possession by the defendant, at or about that time, of corresponding tools may be shown, because by such evidence it is shown that the defendant had the means to commit the offense in the mode in which it was committed and because the possession of the means by which the offense was actually committed is a circumstance which tends when other circumstances do not oppose but agree with it, to connect the accused with the commission of the offense. But if it appears from other evidence that the burglary was not committed by means of burglarious tools, as where the burglar has entered by an open door or window, the possession of burglarious tools cannot be shown; because, so far as the case shows, there is no connection, probable or possible, between it and an offense confessedly committed without the aid of such tools. (People v. Winters (1866) 29 Cal. 658, 659-660.)

Defendant asserts that none of the objects found on his person other than the socks were shown to have been connected with burglary, and that therefore their admission was improper under the principle last set forth in the above quotation. (See People v. Sansome (1890) 84 Cal. 449, 453-455.) He points to the fact that no marks were left on the doorways. This overlooks the testimony of

fficer Miller to the effect that the strips taken from the defendant ere burglar tools used to slip a lock on a door; that they were dapted to and in fact could be used to open the door to the apart-ent building and the door to apartment number 002; and that they sually do not leave a mark. The testimony as to the experiments ith the strips was properly admitted. (People v. Sturman (1942) 56 l. App. 2d 173, 181; People v. Savage (1936) 14 Cal. App. 2d 142, 4.) It is clear that the tools have a high probative value and e properly admissible where they are shown to have a physical nnection with the means used to effect the entry. (People v. likes (1955) 44 Cal. 2d 679, 683; People v. Godlewski (1943) 22 l. 2d 677, 685; People v. Hope (1882) 62 Cal. 291, 294-295; People Lindsay, supra, 227 Cal. App. 2d 482, 497; People v. Weems (1961) 7 Cal. App. 2d 405, 410; People v. Nichols (1961) 196 Cal. App. 2d 3, 227; People v. Cartier (1959) 170 Cal. App. 2d 613, 616.) The ols also are properly admitted if they are reasonably adapted to e performance of the entry which is in fact effected. (People v. pe, supra, 62 Cal. 291, 294; People v. Clinton (1926) 78 Cal. App. 1, 454; People v. Trujillo, supra, 32 Cal. 2d 105, 116; and see eople v. Lindsay, supra, 227 Cal. App. 2d 482, 499; People v. Peete 921) 54 Cal. App. 333, 347-351.) There was no error in admitting e strips.

Some cloud is thrown on the admission of the other articles the statement in Winters, supra, on which defendant relies. (See so People v. Sansome, supra, 84 Cal. 449, 453-455; People v. Nichols, pra, 196 Cal. App. 2d 223, 227-228; and People v. Miller (1957) 0 Cal. App. 2d 212, 213-214.) Defendant fails to consider the cir-mstances of this case. The articles were not secured in connection

with an arrest removed in time and distance from the offense, but one immediately connected with the alleged illegal act. Under such circumstances the possession of articles - sack, gloves, pen-lights, watch cap, and bolt cutters - reasonably adapted to use in connection with the commission of a burglary whether so used or not, are properly admissible as showing defendant's felonious intent. (People v. Gibson (1949) 94 Cal. App. 2d 468, 470, 471-472; People v. Sturman, supra, 56 Cal. App. 2d 173, 180-181; and see People v. Weems, supra, 197 Cal. App. 2d 405, 410.)

It is concluded that all of the articles offered by the prosecution were properly admissible into evidence.

III. The exhibition of the articles prior to their admission in evidence did not constitute prejudicial error.

Defendant asserts that the trial court erred in permitting the district attorney to keep several items of evidence on the counsel table in front of him and in full view of the jury prior to the introduction of any testimony regarding them, or their being marked for identification, or admitted into evidence. His failure to point out any transcript reference where allegedly erroneous rulings were made, renders it unnecessary to give this argument any consideration. (Cal. Rules of Court, rule 15(a); People v. Meyer (1963) 216 Cal. App. 2d 618, 635.)

It has been noted, however, that the defendant early in the trial, while the victim was identifying his socks, requested: "Will counsel be further directed not to place on counsel table such exhibits as he may have until or unless they have been produced into evidence?" The items in question were not identified except as "certain pieces of what appear ... to be material." Subsequently a similar ob-

jection went to the gloves, the black bag, some socks and a hat. The court indicated they should not be so exhibited if not relevant, but permitted the prosecutor to proceed as he deemed advisible in regard to relevant articles. A final objection was made to articles on the counsel table which were thereupon exhibited to Officer Hoover and identified by him as having been removed from the possession of the defendant.

The point involved is not a question of trial technique and order of proof. It involves balancing possible prejudice, in the event articles of a highly inflammatory or prejudicial nature, which are subsequently found inadmissible, are exhibited before the jury, with the necessity of proceeding with the trial in an orderly, efficient, and timely manner without unwarranted interruptions for the purpose of reviewing each item of evidence out of the presence of the jury. The exhibition of improper materials to the jury should not be condoned. (See Page v. State (1949) 208 Miss. 347, 361-362; 44 S. 2d 459,465; and Helton v. Mann (1942) 111 Ind.App. 487,500; 40 N 2d 395, 400-401.) On the other hand insofar as the articles are admitted into evidence, no error can be shown and no possible prejudice can result. The exhibition of the bolt cutters, despite the fact that they were not admitted in evidence, cannot be the basis of error, because, as has been indicated, the trial court could have admitted them in evidence. (See People v. Miller, supra, 150 Cal. App. 2d 212, 214; and cf. People v. Gibson, supra; and People v. Sturman, supra.) Furthermore, the testimony that they were found on the defendant was never stricken from the record, and the error, if any, in exhibiting what was properly referred to verbally could not be prejudicial.

IV. There was no error in referring in argument to defendant's possession of the bolt cutters.

Defendant refers to numerous occasions on which the rosecutor in making his argument to the jury referred to the fact hat defendant had the bolt cutters in his possession when apprehended. t is error, and may be prejudicial, to refer to an article as though t were utilized in the commission of an offense, if, despite a eference to it in the testimony, it was not admitted into evidence nd not connected up with the crime in question. (People v. Evans 1952) 39 Cal. 2d 242, 246-247 and 251-252.) In the instant case, owever, the article mentioned in the argument was in fact connected p with the defendant at about the time of the commission of the ffense. For the reasons set forth above it was not error to admit estimony of this fact, and it was not error to refer to that testi- ony even though the article itself had been, albeit erroneously, xcluded. (People v. Amaya (1901) 134 Cal. 531, 539; People v. Costa 1956) 145 Cal. App. 2d 445, 447.)

The appeal from the order denying the motion for new trial s dismissed, and the judgment (and the sentence as merged therein) s affirmed.

Sims, J.

E CONCUR:

ullivan, P. J.

olinari, J.

EXHIBIT "B"

ORIGINAL FILED

DEC. 6, 1966

CLERK U.S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GRANT WILSON, Jr., Petitioner, -v- FRANK MADIGAN, Respondent. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	No. 44981

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, VACATING ORDER RELEASING PETITIONER ON BAIL, AND ORDERING PETITIONER'S RETURN TO THE CUSTODY OF RESPONDENT.

Petitioner stands convicted by the Superior Court of the State of California, in and for the County of Alameda, of first degree burglary, Cal. Pen. Code Sec. 459. He is currently free on bail from state custody under the order of this Court dated April 14, 1966, pending outcome of this habeas corpus proceeding. Petitioner was sentenced to a term of from five years to life. The execution of the sentence was suspended, and he was placed on probation for a period of four years upon

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

terms and conditions which included serving a term of one year in the county jail. Subsequent to his conviction, petitioner served approximately two months in the county jail after which the trial court set bail and released petitioner pending the outcome of his appeal in the California District Court of Appeal. The District Court of Appeal decided adversely to petitioner on November 30, 1965, People v. Wilson, 238 Cal.App. 2d 447 (1965). Appeal to the California Supreme Court followed, and on January 26, 1966, the Supreme Court of California denied a petition for a hearing of his appeal. Thereafter, on March 29, 1966, execution of the remainder of the sentence was ordered and petitioner was ordered back into respondent's custody.

The substance of petitioner's allegations is that he was denied his federally protected constitutional rights when the prosecution introduced evidence of his silence in response to accusatory questions as an admission by silence. In this contention petitioner is incorrect, because of the time at which his case arose. Petitioner's trial commenced February 20, 1964. It is now clear that the silence of an individual under police custodial interrogation cannot be used against

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

him in a criminal trial,[1] Miranda v. Arizona, 384 U.S. 436, 468 n. 37 (1966); however, the holding in Miranda is not available to persons whose trials began before June 13, 1966, Johnson v. New Jersey, 384 U.S. 719 (1966). Petitioner contends that footnote 37 in the Miranda opinion which supports his position should not be measured by the prospective application ruling of Johnson, but by the rule of prospective application for Griffin v. California, 380 U.S. 609 (1965), as stated in Tehan v. Shott, 382 U.S. 406 (1966).[2]

---

[1] In view of the disposition of the case, it is not necessary to decide whether there was "custodial interrogation" in this case, and the Court expresses no view as to whether petitioner was in custody at the time the interrogation was conducted.

[2] The rule for prospective application of Griffin is different from that applied to Miranda. The Griffin decision is applicable to all cases not final as of the date Griffin was decided. Tehan v. Shott, 382 U.S. 406 (1966). Miranda is applied only to trials commencing as of the date of the decision or later. Johnson v. New Jersey, 384 U.S. 719 (1966).

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

The argument is novel and there is an analytical analogy between comment on the failure of a defendant to testify, which is prohibited by Griffin, and an adoptive admission by silence in this case. Nonetheless, the plain language of Miranda indicates that petitioner's contention is not well taken. The footnote in question provides:

> . . . . Lord Devlin has commented:
>
> "It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." Devlin, The Criminal Prosecution in England 32 (1958).
>
> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation . Cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law - Confessions, 79 Harv. L. Rev. 935, 1041-1044 (1966). See also Bram v. United States, 168 U.S. 532, 562 (1897). (Emphasis added.)
>
> Miranda v. Arizona,
> 384 U.S. 436, 468 n.37 (1966)

It is apparent by a reference to the relevant text of the opinion which disucsses the coercive evils of interrogation of a suspect, including the dilemma posed by silence in the face of accusations and also the precise language of the footnote, that the footnote is considered a part of the holding in Miranda. The reference to Griffin v. California,

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

supra, is merely by way of analogy and does not incicate that the prospectivity should be governed by the same rules applicable to Griffin.

Accordingly, this petition for writ of habeas corpus must be and hereby is DENIED, the order releasing petitioner on bail is vacated, and IT IS ORDERED that petitioner be returned to custody of respondent in accordance with his previous state sentence.3/

Dated: December 6, 1966

/s/ ALFONSO J. ZIRPOLI
United States District Judge

3/ The Court notes that California law has been a bellwether in this particular area, as well as many other areas concerning the rights of the criminal defendant. In People v. Simmons, 28 Cal. 2d 699 (1946), it was held that there are very limited situations in which admissions by silence can be introduced as evidence of guilt in a criminal trial. Factors to be considered in making the determination included a consideration of whether the conduct of the accused merely indicates a desire to avail himself of the rule against self-incrimination or whether it could reasonably give rise to an inference of acquiescence or guilty conscience. When this test is applied to the facts of this case, it seems clear that the state itself conceded that petitioner was invoking his privilege against self-incrimination. The record is replete with comment by the prosecutor on the silence of the defendant. Two of the more startling examples of comment by the prosecutor are:

> . . . ."What is your name?" This is an innocent man, mind you, and he didn't know anything about the law; just a grand guy out there in the street. . . . . Trial Record p. 398 (emphasis added).
>
> . . . . That man knew in advance what to do - for example, not to talk to police officers. Trial Record p. 423 (emphasis added).

(For conclusion of this footnote, see p. 6)

It is surprising to this Court that the state courts found that the above comments did not violate the rule laid down in the Simmons case; but the question is one of state law, not federal law, since petitioner cannot come within the date for prospective application of Miranda.

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO

EXHIBIT "C"

EDWARD L. CRAGEN
JOHN J. FAHEY
555 Polk Street, Suite 201
San Francisco, California 94102
Telephone: 776 8990

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

GRANT WILSON, Jr.,

Petitioner,

-v-

FRANK MADIGAN,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

NO. 44981

CERTIFICATE OF PROBABLE CAUSE TO APPEAL

The Court having considered petitioner's application for a Certificate of Probable Cause to Appeal; and, the Court being unable to say that an appeal from its order denying said application would be frivolous;

AND GOOD CAUSE APPEARING THEREFOR

THIS COURT CERTIFIES THAT THERE IS PROBABLE CAUSE TO APPEAL ITS ORDER DENYING THE PETITION FOR THE WRIT OF HABEAS

CORPUS HEREIN DATED DECEMBER 6, 1966. (28 U.S.C. Sec. 2253).

DATED: December 14, 1966.

/s/ ALFONSO J. ZIRPOLI

JUDGE

EDWARD L. CRAGEN
ATTORNEY AT LAW
SAN FRANCISCO